

In the United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.
OLAF O. HANA,
Defendant in Error.

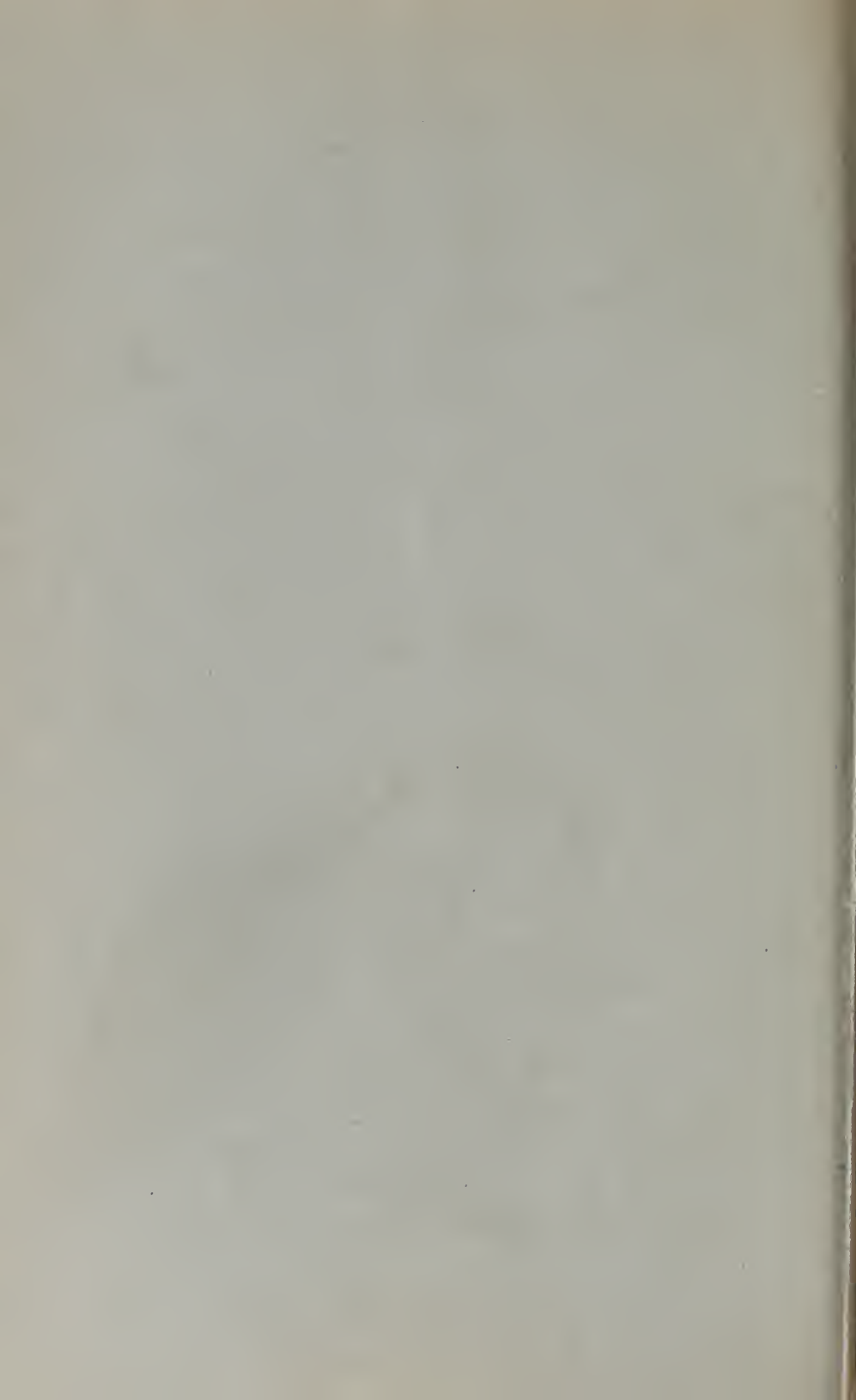
UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE
WESTERN DISTRICT OF WASH-
INGTON, NORTHERN DIVISION.

BRIEF OF PLAINTIFF IN ERROR.

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STATEMENT OF THE CASE.

The defendant in error was master of the American steamship "H. B. Lovejoy." On the 31st of January, 1921, the steamer "H. B. Lovejoy" arrived at the port of Seattle in the Northern Division of the Western District of Washington from a foreign port. Said defendant in error filed with the Collector of Customs at the port of Seattle certain manifests and store lists of the merchandise, purporting to be complete and correct manifests and store lists of all merchandise on board. Thereafter

the Customs Inspector found on board said vessel certain liquor which had not been manifested or which had not appeared on the store list, and thereafter a penalty under Section 2809 R. S. equal to the appraised value of the liquor, to-wit, \$73.50, was assessed against the said defendant in error by the Customs Department. Upon demand said defendant in error refused to pay this sum and thereafter a complaint was filed in the District Court to recover said sum from said defendant in error, to which complaint defendant in error filed a general demurrer. The court in its memorandum decision (Tr. p. 8) sustained the demurrer and thereafter petition for re-argument was filed and petition denied (Tr. p. 12). Judgment for defendant in error was accordingly entered, to which plaintiff in error duly excepted.

This writ of error is prosecuted from the judgment.

ARGUMENT.

This is a proceeding brought under Sec. 2809, R. S. (Comp. Stat. 5506), which provides that:

“If any merchandise is brought into the United States in any vessel whatever from any foreign port without having such a manifest on board, or which shall not be included or de-

scribed in the manifest, or shall not agree therewith, the master shall be liable to a penalty equal to the value of such merchandise not included in such manifest; and all such merchandise not included in the manifest belonging or consigned to the master, mate, officers, or crew of such vessel, shall be forfeited."

The question in this case is: "Is liquor merchandise; can it be legally imported and must it be manifested?" The courts have interpreted the term "merchandise" variously. Section 2766, R. S., defines it as "goods capable of being imported." In the case of *U. S. vs. Feathers of Wild Birds*, 267 Fed. 964, at 967, the court interprets merchandise to mean, "physically capable of being imported," and in the case of *U. S. vs. Sischo*, 270 Fed. 958, as "legally capable of being imported."

It is not necessary in this case to insist on a broad definition of merchandise. Liquor comes within the more restricted definition of merchandise, of the *Sischo* case, *supra*, that is, "goods legally capable of being imported." Liquor may be legally imported—Section 27, Title II, National Prohibition Act—and is therefore merchandise.

In the case of *U. S. vs. The Goodhope* (District Court, West. Dist. of Wash.), 268 Fed. 694, at 695, the court says:

“It is apparent from the provisions of this Act (N. P. Act) that intoxicating liquor may be imported for non-beverage purposes.”

It is fundamental that the mere fact that all goods whether dutiable or non-dutiable must be manifested. It is for the customs inspector to ascertain the dutiability and assess the proper duty. In the case of impure tea, impure tea is forbidden importation, but would this court hold that tea because found to be impure need not be manifested? It is for the customs inspectors to ascertain whether after it is manifested it could be imported; that would depend upon analysis of its quality. It is for the customs inspector to ascertain whether the tea is of a quality that could be imported. So, in the case of liquor, it is for the customs inspector to ascertain whether the provisions of the law have been complied with, and to refuse its entry to the customs house until the provisions have been complied with. It is no more proper for a master of a boat to say what he should manifest in regard to liquor or impure tea than would be the case of goods on which there was no duty. The customs inspector and not the master shall decide, and to facilitate the operation of the law manifests are necessary.

Goldman vs. U. S., 263 Fed. 340.

In the *Sischo* case, 270 Fed. 958 (now before the Supreme Court of the United States on writ of *certiorari*, the court (opinion of Judge Wolverton) there says:

“We should bear in mind that opium and its derivatives, except smoking opium, are subject to importation for medicinal purposes, and it is no doubt the intendment of Section 2809, R. S., that such merchandise should be included in the vessel’s manifest. It is capable of being imported in the sense that its importation is not unlawful.”

So too, again with liquor: Liquor is subject to importation for medicinal, mechanical and scientific purposes, and it was no doubt the intendment of Section 2809, R. S., that such merchandise should be included in the vessel’s manifest. Judge Hunt, while he dissented to the holding of the court as regards smoking opium, uses the following words:

“Suppose a cargo of *liquor* is brought over, or a quantity of aigrette or osprey plumes, or skins of wild birds, none of which may lawfully be brought into the country; would not the statute defining merchandise include them?”

as though it was beyond his comprehension to imagine that such a question would ever be raised. However, Judge Hunt did lose sight of the fact that all of the articles enumerated by him could be lawfully imported conditionally.

In the case of *Goldman vs. U. S.* (C. C. A.), 263 Fed. 340, a conviction for smuggling and receiving a coil of rope which had been landed from a foreign port without permit from a Commissioner of Internal Revenue, was affirmed. There the court considered Section 3082 R. S., and said:

“We think Section 3082 was not intended to be limited to cases of smuggling in the sense of introducing dutiable merchandise without paying and with the intent to avoid paying the duty on it. The proper administration of the customs laws requires it to be given a wider scope. It is important, in order to enforce the collection of duties, to establish many regulations relating to the introduction of merchandise into the country, other than the ultimate one of requiring the payment of duties. These are auxiliary regulations and can only be enforced by the imposition of penalties and punishment for their infraction.”

The mere fact that liquor can not be imported or sold in the open market without restrictions should not take away the character of merchandise. To do this would be to say that all articles on which any restriction is placed as to their sale or importation are not merchandise; this would include firearms, cigarettes, dynamite and other explosives, narcotics, feathers of wild birds, skins of certain animals, a coil of rope as suggested in the case of

Goldman vs. U. S. above cited, and other articles too numerous to mention.

The plaintiff in error contends that the conclusion of the District Court that liquor improperly imported is not merchandise because it can not be appraised and sold in accordance with the customs statutes is manifestly unsound; for, as provided in Section 27, National Prohibition Act, a court order may be taken for the sale of forfeited liquors to persons holding permits to purchase. The liquor thereupon becomes a legitimate article of commerce in accordance with the National Prohibition Act and regulations of the Commissioner of Internal Revenue.

Furthermore, it is respectfully called to the court's attention that the case of *The Goodhope*, above cited, on which the District Court seems to have largely based its opinion in this case, was in turn based on the opinion of the Circuit Court of Appeals in the case of *U. S. vs. One Ford Automobile*, 262 Fed. 374, which has no application here since it is confined solely to a consideration of a war measure—the Act of August 10, 1917, which is not to be confused with the National Prohibition Act. The Act of August 10, 1917, strictly forbids the importation of liquor, while the National Prohibition Act makes

provision for the importation of liquor and has a further proviso that it (the N. P. Act) is in no way to repeal existing statutes except where inconsistent. However, since the decision of *The Goodhope* case, the Circuit Court of Appeals for the Second Circuit, in the case of *U. S. vs. Feathers of Wild Birds, supra*, has, to all intents and purposes, reversed its holding in the *One Ford Automobile* case, 262 Fed. 374, *supra*.

In considering this case the court's attention is respectfully invited to Section 2775, R. S., requiring the manifesting of liquors.

We submit that the judgment of the trial court should be reversed, with directions to overrule the demurrer.

Respectfully submitted,

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